



SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

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No. 77/706

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CLARENCE H. BENNETT, *et al.*,

*Petitioners,*

v.

GILBERT KIGGINS, *et al.*,

*Respondents.*

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**BRIEF OF RESPONDENTS IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI TO THE  
DISTRICT OF COLUMBIA COURT OF APPEALS**

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## QUESTIONS PRESENTED

1. Should a petition for certiorari be granted when petitioners failed to raise any Federal issue in the courts below?
2. Should a petition for certiorari be granted merely to review the trial court record to determine if that court's findings were proper?

## REASONS FOR DENYING THE PETITION

### I

#### PETITIONERS FAILED TO RAISE SPECIFICALLY ANY CONSTITUTIONAL ISSUE IN THE COURTS BELOW

It is fundamental to the jurisdiction of this Court that it appear that a Federal issue was specifically presented to the courts below and that those courts actually decided such an issue. *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934); *Oxley Stave Company v. Butler County*, 166 U.S. 648 (1896). As no such issue was presented or decided, the petition must fail.

In *Oxley*, the Court long ago set forth the applicable principles as follows:

This court may reexamine the final judgment of the highest court of a State when the validity of a treaty or statute of or an authority exercised under the United States is "drawn in question" and the decision is against its validity, or when the validity of a statute of or an authority exercised under any State is "drawn in question" on the ground of repugnancy to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. But it cannot review such final judgment, even if it denied some title, right, privilege or immunity of the

unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was "specially set up or claimed" in the state court as belonging to such party, under the Constitution or some treaty, statute, commission or authority of the United States. Rev. Stat. § 709.

Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted. For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question. 166 U.S. at 653.

Nowhere in the Findings of Fact, the Conclusions of Law or the Order of the Superior Court or in the opinion of the Court of Appeals (Petition for Certiorari at 1a-11a) is there any mention of any constitutional issue raised, specifically or generally, by petitioners herein. By reason of the foregoing, the petition must be denied.

## II

### **PETITIONERS IMPROPERLY SEEK REVIEW OF A DECISION WHICH DID NOT INVOLVE A FEDERAL QUESTION**

Petitioners brought an action charging respondents with common law fraud. After extensive pre-trial discovery, both sides moved for summary judgment, each asserting that there were no material issues of fact and that it was entitled to summary judgment as a matter of law. After oral argument, the trial court issued findings of fact and conclusions of law and awarded judgment to respondents on the basis of the record

before it.\* Thereafter petitioners unsuccessfully appealed. In light of this history, it is clear that by their petition, petitioners are not presenting any genuine Federal questions for possible review but are merely requesting the Court to act as a general appellate court and to review findings of fact made in the trial court below. The Court has no jurisdiction to grant such a request. *Waters-Pierce Oil Co. v. Texas (No. 1)*, 212 U.S. 86 (1909); *Remington Paper Company v. Watson*, 173 U.S. 443 (1899).

In *Remington*, the Court stated:

The action was regularly proceeded with, and was determined against plaintiff in error on grounds which did not involve Federal questions, and therefore it is not within our power to review the judgment of the Supreme Court of the State.

The plaintiff in error thus sought in the state court, and was given opportunity, to litigate the rights claimed by it, and it cannot complain that the guarantees of the Constitution of the United States were denied because the litigation did not result successfully. 173 U.S. at 451.

Similarly in *Waters-Pierce*, it was concluded:

The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal

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\* Petitioners' contention that it was improper for the Superior Court to consider portions of their depositions is without merit. Those excerpts, which were contained in respondents' points and authorities on the summary judgment motions and merely set forth disclaimers of misrepresentations alleged in the complaint, were properly before the lower courts. Super. Ct. Civ. R. 12-I(e). Moreover, there was never any suggestion that they were inaccurate or incomplete.

rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the state court and denied by the rulings and judgment of that court. Sec. 709, Rev. Stat. U. S. Nor does this court sit to review the findings of facts made in the state court, but accepts the findings of the court of the State upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. 212 U.S. at 97.

However, even if it were appropriate for the Court to consider such matters as to which petitioners seek review, the petition would fail for it is clear that summary judgment was properly granted. Such conclusion is established not only by the decisions of the lower courts but also by the fact that petitioners even at this late date cannot point out a single issue of material fact with respect to their charges of fraud which the lower courts overlooked.

In view of the fact that petitioners are clearly asking this Court to review the record in the courts below and the trial court's findings of fact based thereon, the petition must be denied as it does not involve a substantial Federal right.

### CONCLUSION

**The petition for a writ of certiorari should be denied.**

Respectfully submitted,

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